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Utility Shareholder Association of Utah et al v. Public Service Commission of Utah et al : Reply Brief of Utah Department of Administrative Services

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH DEPARTMENT OF ADMINISTRATIVE SERVICES, Plaintiff, v. PUBLIC SERVICE COMMISSION OF UTAH, et al., Defendants.	:	Case No. 18304
UTILITY SHAREHOLDER ASSOCIATION OF UTAH, ALEX OBLAD and HAROLD BURTON, Plaintiffs, v. PUBLIC SERVICE COMMISSION OF UTAH, et al., Defendants.	:	Case No. 18286
UTAH STATE COALITION OF SENIOR CITIZENS, Plaintiff, v. PUBLIC SERVICE COMMISSION OF UTAH, et al., Defendants.	:	Case No. 18303
MOUNTAIN FUEL SUPPLY COMPANY; WEXPRO COMPANY; UTAH DEPARTMENT OF BUSINESS REGULATION, DIVISION OF PUBLIC UTILITIES; and UTAH COMMITTEE OF CONSUMER SERVICES, Intervenors.	:	

REPLY BRIEF OF UTAH DEPARTMENT OF ADMINISTRATIVE SERVICES

Jay D. Gurmankin
Steven H. Blum
GIAUQUE & WILLIAMS
Special Assistant Attorneys General
500 Kearns Building
Salt Lake City, Utah 84101

Attorneys for Utah Department
of Administrative Services

Calvin L. Rampton
Jones, Waldo, Holbrook
& McDonough
800 Walker Building
Salt Lake City, Utah 84111

Attorneys for Wexpro Company

Stephen H. Anderson
Merlin O. Baker
A. Robert Thorup
Ray, Quinney & Nebeker
79 South Main, Suite 400
Salt Lake City, Utah 84111

Attorneys for Utah Department
of Business Regulation,
Division of Public Utilities

Thomas A. Quinn
Ray, Quinney & Nebeker
79 South Main, Suite 400
Salt Lake City, Utah 84111

Attorneys for Utah Committee
of Consumer Services

Edward W. Clyde
Clyde, Pratt, Gibbs & Cahoon
77 West 200 South, Suite 200
Salt Lake City, Utah 84111

Robert S. Campbell
Gregory B. Monson
Watkiss & Campbell
310 South Main Street
Salt Lake City, Utah 84101

R. G. Groussman
180 East 100 South
Salt Lake City, Utah 84111

Attorneys for Mountain Fuel
Supply Company

Donald B. Holbrook
Elizabeth M. Haslam
Jones, Waldo, Holbrook
& McDonough
800 Walker Building
Salt Lake City, Utah 84111

Attorneys for Utility Share-
holder Association of Utah,
Alex Oblad and Harold Burton.

Bruce Plenk
Ronald E. Nehring
Utah Legal Services, Inc.
637 East Fourth South
Salt Lake City, Utah 84102

Attorneys for Utah State
Coalition of Senior Citizens

Craig Rich
Assistant Attorney General
Office of the Attorney General
State Capitol Building
Salt Lake City, Utah 84114

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The Utah Department of Administrative Services (the "Department") respectfully submits this brief in reply to the answering briefs of the Stipulating Parties. 1/

I. THE ASSERTIONS OF THE STIPULATING PARTIES THAT THE ORIGINAL SUPREME COURT DECISION WAS LIMITED TO JURISDICTION AND WAS OTHERWISE DICTA CONTRADICT POSITIONS TAKEN BY THOSE PARTIES IN THIS CASE.

Throughout their briefs, the Stipulating Parties attempt to confine the scope of the original decision of this Court in this case to the issue of the Public Service Commission's ("Commission") jurisdiction over certain oil and gas properties. Thus, state the Division and the Committee, "This Court's holding in the Wexpro Case declared jurisdictional law, but directed no specific plan or result." Joint Brief of Utah Department of Business Regulation, Division of Public Utilities and Utah Committee of Consumer Services ("Joint Brief") at 26. Mountain Fuel states, "[I]t is clear that the Opinion does not mandate specific regulatory conduct. . . ." Answering Brief of Mountain Fuel Supply Company and Wexpro Company ("Mountain Fuel Brief") at 32, n. 13. See also Mountain Fuel Brief at 6, n. 4, and 8.

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1. This Brief shall sometimes refer collectively to Mountain Fuel Supply Company ("Mountain Fuel"), Wexpro Company ("Wexpro"), the Utah Department of Business Regulation, Division of Public Utilities ("Division") and the Utah Committee of Consumer Services ("Committee"), as the "Stipulating Parties." The Utility Shareholder Association of Utah, Alex Oblad and Harold Burton shall be referred to as the "Shareholder Association."

The parties incorporated their limited interpretation of this Court's decision in the Stipulation.

> However, in Committee of Consumer Services v. Public Service Commission of Utah, 595 P.2d 871 (Utah 1979), the Utah Supreme Court reversed the Order of the Commission on jurisdictional grounds and remanded the issue to the Commission for further hearings. . . .

Stipulation ¶1.13, R. 03548 (emphasis added).

The Stipulating Parties' attempt to characterize this Court's decision as solely jurisdictional, as merely suggestive, Mountain Fuel Brief at 9, and as "direction and guidance", Joint Brief at 3, flies in the face of the position taken previously by each of the Stipulating Parties.

The Stipulating Parties' denial that this Court's decision declared that as a matter of law the public interest requires that the oil profits from utility assets be used to reduce future rates; that the Commission must decide, before Wexpro or Celsius can exist, whether it is in the public interest for Mountain Fuel to split its oil and gas exploration function with a subsidiary; that if Wexpro exists it is, by nature of its gas plant, a public utility; and that Mountain Fuel cannot pay Wexpro or Celsius market prices for gas and pass the entire cost to ratepayers, is a denial directly contrary to the positions taken by these parties when other positions were more convenient to their aims.

In Mountain Fuel's and Wexpro's Petition for Writ of Certiorari to the United States Supreme Court ("Mountain Fuel Petition for Certiorari"), Appendix "A" to Brief of Utah Department of Administrative Services ("Department Brief"), Mountain Fuel and Wexpro stated:

> Upon direct appeal, the Utah Supreme Court, in a divided opinion, held that the non-utility oil properties had always been and are utility assets, and that these properties and the oil revenues generated from them should be "applied to reduce the cost of gas" to the Utah utility customer.

Mountain Fuel Petition for Certiorari at 13 (emphasis added).

> [T]he court majority, on the basis of a new theory that Mountain Fuel stood in a "trust relationship" when it sold natural gas to its utility customers . . . held that (i) sales of interstate gas by Wexpro to Mountain Fuel must be at the cost-of-service price rather than the federal ceiling price, even when the gas comes from acreage independently developed by Wexpro . . . and (ii) Wexpro, along with any other company in interstate commerce that sells jointly developed gas to Mountain Fuel, is itself a public utility subject to Utah regulation.

Id. at 14 (emphasis added).

> These concepts, taken together, leave no room for Mountain Fuel or Wexpro to conduct a non-utility business in oil or gas, subject Wexpro to Utah regulation as a public utility, and require Wexpro to sell gas to Mountain Fuel at cheap prices . . . far below the federal ceiling level for comparable vintage supply.

Id. (emphasis added).

> This case is mature for review by this Court because the federal questions have been resolved with finality, the regulation and taking are certain and all that remains is an accounting proceeding.

Id. at n. 7 (emphasis added). Mountain Fuel's and Wexpro's new position, which attempts to limit the decision's scope, should be accorded by this Court whatever credibility it can muster in light of their conveniently changed position.

The Division's and Committee's position that the decision was solely jurisdictional is entitled to absolutely no credibility--indeed, the Division is judicially estopped from taking that position. In their Brief in Opposition to Mountain Fuel's Petition for Certiorari to the United States Supreme Court ("Brief Opposing Certiorari"), Appendix "B" to the Department's Brief, the Division and the Committee stated to the United States Supreme Court:

> The Utah Supreme Court held with regard to the oil and gas properties held in Mountain Fuel's non-utility accounts (1) such properties were utility properties, and (2) such properties should be included in Mountain Fuel's utility accounts for ratemaking purposes. ... The bottom line of the Utah Supreme Court's decision was that the net profits from Mountain Fuel's oil properties beyond all costs associated with their production, including the cost of capital, should be applied to the benefit of the Utah ratepayers through a reduction in their future rates. (Citations omitted.)
>
> * * *
>
> The Supreme Court of Utah, in light of these past practices, adopted a "no-profit-to-affiliates" rule which prohibited such intracompany profits from being included in consumer rates, and applied that rule to the Mountain Fuel-Wexpro option so as to prevent any profit realized by Wexpro under that option from being passed on to Mountain Fuel's ratepayers. The Utah Supreme Court also held that Wexpro, by reason of its relationship as a wholly-owned subsidiary of Mountain Fuel and the unique relationship

> between Mountain Fuel and Wexpro created under the Purchase and Sale Agreement and the Joint Exploration Agreement, was, under Utah law, a public utility.
>
> * * *
>
> The Supreme Court not only set aside the Purchase and Sale Agreement and the Joint Exploration Agreement, the Supreme Court of Utah left open the question of whether Wexpro is to exist at all.

Brief Opposing Certiorari at 14-16 (emphasis added).

Moreover, the Division and the Committee now give as one basis for limiting the scope of this Court's decision the consistent "understanding of the Division and the Committee, that a portion of the oil profits would be retained by the shareholders to compensate for that risk of development assumed by the shareholders. . . ." Joint Brief at 8. That is a categorical misstatement of the Division's and Committee's consistent position. Until the Stipulation and Agreement, it was always the position of the Division and Committee that the shareholders had never assumed any of the risk of development and that this Court's decision held that all oil profits from utility assets must be used to reduce rates. Not only did the Division argue to the United States Supreme Court the positions quoted at pages 4-5, supra, but the Division repeatedly argued to the Commission after remand that this Court had decided that the ratepayers are entitled to all of the oil profits because they have borne all of the risk of exploration and development.

In its Hearing Brief on Remand, the Division stated:

> To the extent this Commission considers any issue other than classification and the reduction of rates to the extent of all net oil and gas profits or to the extent this Commission considers any issue in a manner inconsistent with the Utah Supreme Court's opinion, then this Commission is not within its statutory mandate, and its actions will be contrary to law.

Id. at R. 02491-92 (emphasis added).

> To the extent that portion of the [Commission's Prehearing] Order means less than all of the net oil profits on all utility assets are to be applied to reduce the cost of gas, that portion of the Order is not in accordance with the Supreme Court opinion and must be stricken.

Id. at R. 02492-93 (emphasis added). See also id. at R. 02486, 02487-88, 02490, 02493, 02494, 02496, 02500.

The Division further argued in its Memorandum in Opposition to Motions to Enlarge Scope of Prehearing Order:

> "[N]on-utility" net income in 1977, 1978 and 1979, derived from properties developed with ratepayer risk money, totaled an additional $31,103,000. These profits must be accounted for to ratepayers in this proceeding.

R. 02270.

The Division has now for the first time adopted the contribution theory, a theory propounded by Mountain Fuel after its Petition for Certiorari was denied by the United States Supreme Court. The Division fought that theory tooth and nail. In the Division's Motion to Strike Prefiled Testimony, R. 02206, the Division moved to strike any evidence relevant to the "contribution" theory. The Division argued that the contribution theory was foreclosed

because this Court had already finally determined that the ratepayers had assumed all of the risks.

The Division's and Committee's change of position, and their refusal to acknowledge that their positions are changed, are especially surprising since prior to the settlement they took Mountain Fuel and Wexpro to task for that very ploy. In its Hearing Brief on Remand before the Commission, the Division argued:

> Mountain Fuel is not entitled under our law to tell the United States Supreme Court that the Utah Supreme Court's decision means one thing, and then after failing to gain review on certiorari, to change its story and tell this Commission that the Utah Supreme Court's decision means exactly the opposite.
>
> A party to litigation is not permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits. Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (1953). Parties are not allowed to play "fast and loose with the courts," an evil the courts should not tolerate. Intentional self-contradiction used as a means of obtaining unfair advantage is an affront to judicial dignity. Id.

R. 02498.

The same proscriptions apply to all the Stipulating Parties, including the Division and the Committee. See Roy S. Ludlow Investment Co. v. Salt Lake County, 551 P.2d 1259 (Utah 1976); Provo City Corp. v. Cropper, 28 Utah 2d 1, 497 P.2d 629 (1972). See also Standage Ventures, Inc. v. State of Arizona, 114 Ariz. 480, 562 P.2d 360 (1977); Cf. Citizens Bank v. C&H Construction & Paving Co., Inc., 89 N.M. 360, 552 P.2d 796 (1976).

II. THE STIPULATING PARTIES' POSITION THAT THE COMMISSION WAS FREE TO IGNORE THIS COURT'S DECISION AND FASHION ITS OWN RELIEF INDEPENDENT OF THIS COURT'S PRONOUNCEMENTS MISCONCEIVES THIS COURT'S DECISION AND MISCONCEIVES THE PROPER SCOPE OF THIS COURT'S REVIEW.

Mountain Fuel and Wexpro argue that the Commission is free to ignore this Court's decision and "to fashion a new and different solution to the problem." Mountain Fuel Brief at 38. The Division and the Committee argue that this Court "could not bind the Commission's discretion to formulate an appropriate regulatory treatment to be accorded [utility] properties," and that "[t]he Agency is free, within the declared law, to take a totally new approach to the problem." Joint Brief at 27. The Stipulating Parties rely for these propositions on F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); National Labor Relations Board v. Food Store Employees Union, 417 U.S. 1 (1974); and S.E.C. v. Chenery Corp., 332 U.S. 194 (1947).

Such reliance is misplaced. Not one of these cases supports the freedom of an administrative agency to ignore the mandate and order of a jurisdiction's supreme arbiter.

Moreover, to the extent the Stipulating Parties premise their position on this Court's having overstepped the proper bounds of review by "fashioning a remedy," they have misconceived both what this Court's decision did and the state of administrative law. This Court held, inter

alia, that as a matter of law, the public interest (a) requires that the ratepayers have the benefits of net oil profits from utility assets through a reduction in rates and (b) prohibits profits from wholesale sales between Mountain Fuel and wholly-owned subsidiaries from being charged to ratepayers in the retail price of gas. Along with the other holdings of the decision, these are legal determinations, and are unquestionably within this Court's power and responsibility. In essence, the Stipulating Parties' argument is that this Court does not have the power to declare, define, and determine the law of this state. That is preposterous.

The question whether the public interest requires as a matter of law the utilization of the principle "gain follows risk" is a question of law. 2/ The majority clearly decided it as a question of law:

> When the expenses to develop the utility properties were included in the rate base, the ratepayers were entitled to share in the benefit by having the net profits on the oil, and other hydrocarbon substances, sold by Mountain Fuel to others, applied to reduce the cost of gas.

595 P.2d at 876 (citations omitted).

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2. The Stipulating Parties rely on Empire Electric Ass'n v. Public Service Commission, 604 P.2d 930 (Utah 1979), which held that the Commission had considerable latitude of expression in determining the public interest. The Department agrees with that proposition. But that proposition implicitly recognizes that there are latitudes of discretion beyond the Commission's power. Those are the latitudes wherein this Court can determine as a matter of law that the public interest is or is not served.

No court has yet held that the question of the proper allocation, between investors and customers, of gains on utility assets, is not a legal question subject to appellate review and substitution of judgment.

To the contrary, the appellate courts which have decided the question on review from administrative agencies have decided it as a question of law. In fact, in adopting the legal principle "gain follows risk," this Court implicitly followed the decision of the Circuit Court of Appeals for the District of Columbia in Democratic Central Committee v. Washington M.A.T. Commission, 485 F.2d 786 (D.C. Cir. 1973), cert. denied, 415 U.S. 935 (1974). See 595 P.2d 893 (Wilkins, J. dissenting). Democratic Central Committee, in a painstaking analysis of the "gain follows risk" issue, determined it after tracing its adjudicative history through appellate courts and agencies. Democratic Central Committee cited New York Water Service Corporation v. Public Service Commission, 12 App.Div. 2d 122, 208 N.Y.S. 2d 857 (1960); and City of Lexington v. Lexington Water Co., 458 S.W.2d 778 (Ky. 1970), where appellate courts decided the issue. Those courts did not consider it outside the scope of appellate review.

The Division's argument that this Court's decision "could not bind the Commission's discretion to formulate an appropriate regulatory treatment to be accorded such properties," Joint Brief at 27, is absolutely contradicted by

Democratic Central Committee, which is respectfully commended to this Court's attention for careful scrutiny.

Undeniably, appellate courts have jurisdiction to review legal determinations of administrative agencies. See, 4 K.C. Davis, Administrative Law Treatise, Ch. 30 (1st Ed. 1958) (Supp. 1976 and 1982). While it is often difficult to divide legal questions from factual questions, id., Democratic Central Committee, New York Water Service Corp. and Lexington Water Company make clear that this question is a legal one.

Likewise, the no-profits-to-affiliates question; the question whether an entity with a gas plant is a public utility; and the question whether the Commission can allow Mountain Fuel to split its utility function with a subsidiary without an adequate hearing, are legal questions. The fact that the relief which the Commission must apply on remand--e.g., a roll-in of oil profits to reduce rates--flows inexorably from legal determinations on these questions does not make them any less legal determinations.

This Court's legal determinations were well within its power. Pottsville Broadcasting, Food Store Employees and Chenery, are inapposite here. None of those cases involved the failure of an administrative agency to follow the law of the case; or to follow the directives of a supreme tribunal or intermediate appellate tribunal; or to follow an appellate mandate; or to consider an appellate court's legal

pronouncements as binding. None of those cases dealt with the abject failure by an administrative agency to follow the law--in short, none of those cases dealt with the question herein presented. Indeed, Pottsville Broadcasting itself held:

> On review the court may . . . correct errors of law and on remand the Commission is bound to act upon the correction.

309 U.S. at 145. 3/

In fact, the cases which are on point have distinguished Pottsville Broadcasting and Food Store Employees on grounds directly applicable to the instant case.

In Chicago & Northwestern Transportation Co. v. United States, 574 F.2d 926, 929-30 (7th Cir. 1978), the Seventh Circuit held the doctrine of "law of the case"

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3. There is no broad principle of administrative law as stated in Pottsville Broadcasting. In fact,

> The sweep of Pottsville was cut back when Congress, on July 16, 1952, amended 47 U.S.C. §402 by adding subsection (h), providing that in the event of a court decision reversing an order and remanding the case to the FCC "to carry out the judgment of the court" the FCC has the duty "unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record which said appeal was heard and determined." The Committee report stated that the addition was "intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal.
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> Greater Boston Television Corporation v. Federal Communications Commission, 463 F.2d 268, 281-82 (D.C. Cir. 1971).

applicable to administrative proceedings, and held an administrative agency bound on remand to apply the legal principles laid down by the appellate court. It expressly distinguished Pottsville Broadcasting, and held that while ordinarily a court may not direct an administrative agency to reach a particular result, that limitation does not preclude the application of the doctrine of "law of the case" on review of administrative orders. Id. In Chicago & Northwestern, the Seventh Circuit further expressly held that Pottsville Broadcasting itself requires an administrative agency on remand to apply the legal principles laid down by the court.

The D.C. Circuit in City of Cleveland v. Federal Power Commission, 561 F.2d 344 (D.C. Cir. 1977) also expressly held Pottsville Broadcasting inapplicable to an agency determination which violates the letter or spirit of the mandate of an appellate court. Citing Pottsville Broadcasting, the Court held:

> We are mindful that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." . . . To this stage of the litigation, however, only purely legal questions have emerged and no aspect of congressional policy is involved, certainly as yet.

561 F.2d at 346-47, n. 24 (citations omitted). City of Cleveland thus held:

> The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case," and the higher tribunal is amply armed to rectify any deviation through the process of mandamus. "That approach," we have said, "may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision." These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies.

Id. at 346. See Service Employees International Union v. National Labor Relations Board, 640 F.2d 1042, 1045-46 (9th Cir. 1981).

This Court has itself broadly stated its powers to make legal determinations, and the duty of the Public Service Commission to follow them:

> Notwithstanding the acknowledged powers of the Commission, and the deference accorded its powers, the statutes governing its procedure provide for a review by this court. This clearly indicates that no "rule of infallibility" should apply. Such a standard, or any pretention thereto, would be difficult to live up to. It is to be assumed that the duty imposed on this court was intended to be a substantial and responsible review of the proceedings of the Commission and not a mere pro forma rubber-stamping of its actions. That is the basis for the rule referred to above that the Commission's action will not be sustained if it is so without foundation in fact or reason that it must be deemed capricious and arbitrary.

Williams v. Public Service Commission, 29 Utah 2d 9, 13, 504 P.2d 34, 37 (1972) (citations omitted). See also Silver Beehive Telephone Co., Inc. v. Public Service Commission,

30 Utah 2d 44, 512 P.2d 1327 (1973); Lake Shore Motor Coach Lines, Inc. v. Welling, 9 Utah 2d 114, 339 P.2d 1011 (1959).

Finally, if this Court had "fashioned a remedy," it would have acted within its power to review an administrative agency. Appellate courts do indeed have the power to fashion administrative remedies in certain circumstances. See Democratic Central Committee, supra, at 823-29; National Labor Relations Board v. Madison Courier, Inc., 505 F.2d 391, 398-99 (D.C. Cir. 1974). While this Court's decision did not fashion a remedy, but only declared clear legal principles with certain inexorable results, as a matter of sheer power the law would not foreclose the court from fashioning remedies. Id.

III. SECTION 54-7-10(1), ALLOWING THE COMMISSION TO APPROVE SETTLEMENTS, ADDS NOTHING TO THIS INQUIRY BECAUSE EVEN THE STIPULATING PARTIES ADMIT THAT THE PUBLIC SERVICE COMMISSION CAN ONLY APPROVE LAWFUL SETTLEMENTS.

The respondents argue that settlements are favored in the law, and expressly sanctioned by Utah Code Ann. §54-7-10(1). Of course settlements are favored generally, and the Commission probably did not need §54-7-10(1) to give it authority to approve lawful settlements. But that authority does not and cannot give the Commission the power to approve a settlement contrary to the law of the case and the mandate of this Court. Gorgoza v. Utah State Road Commission, 553 P.2d 413 (Utah 1976).

No case cited by any party supports the proposition that a reviewing court must sanction a settlement contrary to law or to a mandate. It is an absurd proposition. In fact, none of the cases cited by the Stipulating Parties or the Shareholder Association to show that settlements are favored has anything to do with settlement of a case after appellate reversal and remand.

All of the parties admit that §54-7-10(1) does not go so far as to allow a settlement contrary to law. Joint Brief at 25, n. 14; Mountain Fuel Brief at 33; Shareholder Association Brief at 7-8. Thus, Section 54-7-10(1) adds nothing to the inquiry here--whether the Commission approved the settlement of this matter contrary to the dictates of this Court and the law.

IV. CONTRARY TO THE STIPULATING PARTIES' POSITION THAT ALL MATTERS WERE DEALT WITH CONSISTENTLY WITH THIS COURT'S POSITION, THE COMMISSION DID NOT EVEN PURPORT TO DECIDE WHETHER MOUNTAIN FUEL COULD DIVIDE ITS UTILITY OIL AND GAS EXPLORATION AND DEVELOPMENT PROGRAM WITH A SUBSIDIARY.

Mountain Fuel states:

> [T]hat Stipulation and Agreement, and the order of the PSC approving same, clearly meet both the strict legal requirements of the Wexpro decision, as well as the more general observations of the Court herein.

Mountain Fuel Brief at 41. The Division and the Committee state:

> [T]he settlement was in the public interest and its terms complied with the law as declared by this Court in its Wexpro decision.

Joint Brief at 5.

However, in this Court's decision in the critical footnote 8, this Court expressly held that the Commission must decide

> the serious issue of whether it is in the public interest for Mountain Fuel to divide its utility function between itself and a subsidiary. Relevant factors to be considered in this inquiry include any potential administrative inconvenience caused by the necessity of regulating the two corporate entities performing, in essence, a singular utility function; and additional costs and expenses affecting the rate base.

595 P.2d at 878, n. 8. In wholesale contravention of that legal pronouncement, the Stipulation and Agreement were presented to the Commission on the assumption that unregulated subsidiaries of the utility, and not the utility itself, would explore for and develop hydrocarbons. The acceptance by the Commission of that assumption, without an inquiry into whether the assumption is in the public interest, violated the Supreme Court's express mandate that there must be consideration by the Commission of this "serious issue" if Mountain Fuel is to try to divide its utility function with a subsidiary. That issue was never set down for a hearing. No consideration was given that issue by the Commission. No finding on it was made. Instead, the Commission merely assumed, in a capricious manner, what it was ordered to determine.

Moreover, no consideration was given to the corollary question whether, because Mountain Fuel refuses to conduct exploration and development as a utility function, Mountain Fuel should not be required to divest itself of its hydrocarbon exploration and development assets for market value to third parties.

Mountain Fuel and Wexpro admit this to the Court:

> During the pendency of the Case before the Commission on remand, numerous problems and practical considerations required MFS to make certain business decisions and to advise the Commission that the sweep of the majority Opinion of the Supreme Court in Wexpro had made it virtually impossible for the Company to conduct a utility exploration and development program or to raise new investment capital for that purpose. . . .

Mountain Fuel Brief at 11 (emphasis added). This is the same fait accompli propounded throughout the Joint Brief and Mountain Fuel's Brief, i.e., that there was no possibility of Mountain Fuel conducting a utility exploration and development program.

In short, the acceptance of the Stipulation and Agreement by the Commission involved a monumental begging of the question whether Wexpro and Celsius should even exist--a question which the Court directed be examined rather than begged.

V. THE CANCELLATION OF THE JOINT EXPLORATION AGREEMENT AFTER THIS COURT'S DECISION DID NOT MOOT THE QUESTION WHETHER THE TRANSFER OF PROPERTIES TO WEXPRO WAS IN THE PUBLIC INTEREST.

At pages 9-10 of their answering brief, Mountain Fuel and Wexpro again tacitly admit the Stipulation and Agreement were not intended to comply with this Court's decision, when they contend that:

> Soon after the issuance of the majority opinion, Wexpro availed itself of the option and terminated the Joint Exploration Agreement . . . thus making moot the question of whether the 1976 transfer and proposed exploration program were detrimental to the MFS customer, in the public interest, or for market value.

Not only does this contention demonstrate Mountain Fuel's position that this Court's decision was moot and not necessary to abide by, the contension is false and based on a false premise. The Joint Exploration Agreement applied to Mountain Fuel's 2.9 million wildcat acres which had not been transferred to Wexpro under the Purchase and Sale Agreement. The cancellation of the Joint Exploration Agreement obviously could not moot the question whether Wexpro should exist as an oil and gas exploration company or whether the transfer of properties to Wexpro was in the public interest, because even after the Joint Exploration Agreement was cancelled, Wexpro continued to hold the purchase and sale acreage. To understand how vital, rather than moot, the question really is, this Court must understand that even though the Court invalidated the original Purchase and Sale Agreement, the

properties unlawfully transferred to Wexpro have never been transferred back to Mountain Fuel. The Agreement states:

> Certain of the properties described in this Agreement were the subject of the conveyance from Mountain Fuel Supply Company to Wexpro under the Agreement of Purchase and Sale and have been held, operated and owned by Wexpro since the effective date of that Agreement. Except as provided in this Agreement to the contrary, such properties will be and remain the sole and exclusive property of Wexpro.

Agreement ¶VII-2, R. 03613-14.

VI. THE INABILITY OF MOUNTAIN FUEL TO OPERATE A JOINT DRILLING PROGRAM WITH RATEPAYERS IS DUE NOT TO ECONOMIC IMPOSSIBILITY OR IMPRACTICALITY BUT TO ITS OWN REFUSAL TO DO SO.

Mountain Fuel miscites the testimony of John F. O'Leary. Mountain Fuel states that Mr. O'Leary's testimony is that a joint program between the utility and a non-regulated entity will not work. Mountain Fuel Brief at 20. Mr. O'Leary's actual testimony, however, was that a joint program will not work due to the "unwillingness" of Mountain Fuel and the shareholders.

> A. ...I'm pretty sure that if we were [to] find ourselves in a contentious situation in which the Commission attempted to force on an unwilling management a prescription for exploration that that set of skills would go elsewhere. And I think in consequence it would not be a satisfactory experiment from the standpoint of the Commission's overall objectives.
>
> Q. Have there, however, been instances in your experience that you know of where such a--let's call it a joint endeavor has taken place and has been successful?

A. Yes. I don't think that there's any inherent disability on the part of almost any form of organization to conduct a successful exploratory activity. We find, for example, next week I'll be dealing with a French company that is owned by the French government in part. And it conducts its affairs in a thoroughly businesslike manner. And despite the fact that it's roughly 50% owned by its government it goes--proceeds with its business and is a very efficient and effective company in the field of exploration and development. Similarly I deal with companies in Venezuela and Mexico that are nationalized, that are products of the government. And they work, so far as I can see, well. The essence of the matter there is one of willingness.

Q. There's nothing un-American or nefarious about such a joint endeavor then as I understand you?

A. No. . . . And we found that from the very beginning of electric power production in this country municipals have stood side by side with privately-owned, investor-owned corporations and done, so far as I can see, just as well. I don't think that there's any magic to private sector ownership or public sector ownership. I think the magic is willingness.

R. 01311-12 (emphasis added).

The reason there will be no utility exploration and development program was given by counsel for the Division when he explained the Stipulation and Agreement:

COM. CAMERON: Does that mean that the utility will not in the future participate in exploration?

MR. ANDERSON: It does. One of the foundation facts made very clear to us at the outset of our engagement and since then and in no uncertain terms is that there will be no return to the status quo. Mountain Fuel Supply as a utility is out of the oil and gas exploration business, not as a result of this settlement but as a result of their own decisions made previously and subsequent to the Utah Supreme Court case May 10, 1979. The subsidiary,

> Wexpro, or its successors or assigns will be entitled to conduct an oil and gas development program for shareholders free of any utility regulation.

R. 00957 (emphasis added).

There is really no fair reason for the shareholders' unwillingness. Nothing in this Court's decision prevents the shareholders from putting up their own money in the future, investing in their own oil and gas exploration and development with investor funds, and receiving all the profits therefrom. If the shareholders desire to so risk their own money in the future, they will not be limited to a utility rate of return.

What they cannot do is take unregulated profits from ratepayer-financed activity.

VII. CONTRARY TO THE STIPULATING PARTIES' POSITION THAT WEXPRO'S STATUS IS UNRESOLVED, THE STIPULATION AND AGREEMENT REQUIRE, IN CONTRAVENTION OF THE LAW OF THE CASE AND OF THIS STATE, THAT WEXPRO BE UNREGULATED.

The Division and the Committee state that the Stipulation and Agreement do not resolve the issue of whether Wexpro is a utility. Division Brief at 16, n. 10. This statement is patently false. The Stipulation provides:

> Wexpro should be recognized by states in which it operates and all parties as an independent hydrocarbon exploration and development company which is not subject to state public utility regulation and which legally owns or operates the Properties in accordance with the Agreement.

Stipulation ¶2.4, R.03553.

> None of the parties will claim that the Properties owned by Wexpro are subject to the public utility regulation of any state, and all parties will cooperate to obtain legal rulings and, if necessary, statutes so providing. It is acknowledged that the Company's rights with respect to the Properties or benefits from them may be subject to appropriate regulation for ratemaking purposes. However, that fact will in no way be claimed by any party as a basis for state public utility regulation of Wexpro in any of its activities with respect to the Properties. If Wexpro's activities with respect to the Properties are claimed by the parties to be or are successfully subjected to state public utility regulation, Wexpro will be released from its obligations under the Agreement with respect to the Properties which subject it to regulation.

Stipulation ¶11.2, R.03566.

This directly contravenes this Court's decision that:

> A review of the provisions of the two agreements as modified by the Commission clearly indicates that, by the activities performed by Wexpro, it becomes a public utility subject to the jurisdiction and regulation of the Commission. . . . .

595 P.2d at 878.

The Stipulating Parties, with the approval of the Commission, have simply flaunted that holding.

VIII. CONTRARY TO THE POSITION OF THE STIPULATING PARTIES, MOUNTAIN FUEL'S REJECTED SYSTEM OF CLASSIFICATION IS A CRITICAL FACTOR IN THE STIPULATION AND AGREEMENT.

The Division and the Committee argue that the Department "attempts to find an issue" in the Stipulation and Agreement's use of Mountain Fuel's rejected classification system. Joint Brief at 12. Mountain Fuel argues

that the question of classification is "mooted" since it was ostensibly assumed for settlement purposes that the Commission had jurisdiction over all properties included in the transaction. Mountain Fuel Brief at 41.

No analysis is given in support of those arguments. In fact, the classification has critical consequences to the Stipulation and Agreement. Such consequences are contrary to this Court's decision, which rejected the classification system as a basis for allocating benefits of oil and gas exploration and development between ratepayers and shareholders.

The settlement perpetuates that system by basing the "consideration" given for different classes of properties solely on their status as oil or gas properties under Mountain Fuel's rejected system. Thus, Mountain Fuel will pay its subsidiary market prices on gas from exploratory properties and after-acquired properties, but cost-of-service prices on gas from "productive oil" reservoirs. Thus Mountain Fuel obtains a 7% overriding royalty interest on hydrocarbons extracted from exploratory properties, but 2.5% on hydrocarbons extracted from the so-called "after-acquired properties." Thus Mountain Fuel obtains 54% of the net profits from "productive oil" reservoirs, but it receives overriding royalty interests on exploratory formations and after-acquired properties. Joint Brief at 12-18, expressly adopted in Mountain Fuel Brief at 13.

If there were really no difference under the Stipulation and Agreement whether properties were "gas" or "oil", or if it were really assumed that all properties are utility assets, there would be no reasonable basis for those differences in "consideration." Either the classification system is used unlawfully, or the "market consideration" paid for the properties is inherently irrational.

Moreover, the Stipulating Parties' repeated statement that all properties were implicitly "assumed" to be utility properties is false. When arguing the Agreement's largesse to ratepayers, the Stipulating Parties state that some properties involved in the Stipulation and Agreement, including the "after-acquired properties," were not utility assets. Joint Brief at 17.

There is certainly no lawful basis for the assumption that they are "non-utility." In fact, it was the Division's contention on remand that under this Court's decision the "after-acquired properties" were utility assets. The Division stated:

> The properties "acquired" by Wexpro from sources other than Mountain Fuel ("after-acquired" properties) . . . are themselves utility assets and the ratepayer reduction or refund must include the net profits from these assets as well.

Division Hearing Brief on Remand, R. 02487 (emphasis added).

IX. MOUNTAIN FUEL'S PURCHASE OF GAS FROM CELSIUS AT MARKET PRICE VIOLATES THE NO-PROFITS-TO-AFFILIATES RULE.

The Division mischaracterizes this Court's decision in this case when it states:

> The only aspect of the prior arrangement which this Court found violative of the rule was that Wexpro was permitted to charge market prices for gas from properties for which it paid book value.

Joint Brief at 38 (emphasis added). The Division and the Committee then go on to argue that since the transfers were for fair market value, the rule does not apply.

This Court did not intimate that the book value transfer was a necessary predicate to its holding. Moreover, not only does the purported limitation of the no-profits-to-affiliates rule misconceive the holding of this Court, it is contradicted by the very case law cited by this Court in its decision. This Court cited for the no-profits-to-affiliates rule Cities Service Gas Co. v. Federal Power Commission, 424 F.2d 411 (10th Cir. 1969), cert. dismissed, 400 U.S. 801 (1970), which stated:

> A regulated utility may not impose unnecessary costs upon its consumers. See Acker v. United States, 298 U.S. 426, 430-31, 56 S.Ct. 824, 80 L.Ed. 1257, and El Paso Natural Gas Co. v. Federal Power Commission, 5 Cir., 281 F.2d 567, 573, cert. denied California v. Federal Power Commission, 366 U.S. 912, 81 S.Ct. 1083, 6 L.Ed.2d 236. If the properties in question had been retained by Gas Company or an affiliate, cost of service would have determined the rate. We believe that the alienation of the properties to a non-affiliate, even though made in good faith and for value, does not change the situation.

Id. at 417 (emphasis added).

X. THE STIPULATING PARTIES TAKE BASELESS, CONVENIENT AND CONTRADICTORY POSITIONS ABOUT THE VALUE OF THE INTEGRATED PACKAGE OF BENEFITS AND THE INDIVIDUAL BENEFITS CONTAINED THEREIN.

A. The Stipulating Parties' reliance on the 7% overriding royalty interest as both fair market consideration for utility assets and a beneficial reduction from the market price of gas is disingenuous.

The Stipulating Parties repeatedly argue that the 7% overriding royalty interest represents fair market consideration for the transfer of the "wildcat acreage." Mountain Fuel states:

> Indeed, virtually every experienced witness who took the stand, testified unequivocally that . . . the 7% overriding royalty with a call on the gas constituted market value for the transfer of the exploration acreage.

Mountain Fuel Brief at 27. This portion of Mountain Fuel's Brief is expressly adopted by the Divison and the Committee. Joint Brief at 6. See also Mountain Fuel Brief at 17, 26, 29, 43; Joint Brief at 42-44.

However, in trying to rationalize market price for gas, the 7% is magically converted from a fair market value payment for assets to a reduction from market price for gas:

> The utility will also receive a 7% overriding royalty interest on all oil and gas produced from the wildcat acreage (Stipulation §3.3.4), which will assuredly result in net gas costs at substantially below market prices.

Mountain Fuel Brief at 42. See also Joint Brief at 17, 18, 22.

The parties therefore use the same 7% royalty twice in "explaining" the benefits to ratepayers. This "double-dipping" is disingenuous at best.

B. The valuable call on gas and unspecified other benefits may well disappear in the future.

While the Stipulating Parties argue that the call on gas from transferred properties is an important benefit, Joint Brief at 22, 46; Mountain Fuel Brief at 42, the Stipulation and Agreement in fact provide that if the no-profits-to-affiliates rule applies, Mountain Fuel loses its call. Agreement ¶IV-6(c), R. 03610-11. In addition, if any party to the settlement challenges the status of Wexpro as an independent non-regulated entity, Wexpro is released from its obligations with respect to the properties that subject it to regulation. Stipulation ¶11.2, R. 03566. Thus, considering the settlement terms as an integrated whole, there is a potential for an unknown quantum of reduction in benefits to ratepayers in return for the transfer of oil and gas properties, and no clear provision for what happens if Wexpro is released from the Agreement.

C. There is no basis in the record for the contention that the provision of cost-of-service gas will benefit the ratepayers two billion dollars over the next 20 years.

The Division and the Committee cite Exhibit S-2 in support of their contention that "[b]y protecting this

gas from the FERC's NGPA pricing, the ratepayers are benefited nearly Two Billion Dollars ($2,000,000,000) over the next twenty (20) years." Joint Brief at 20 (footnote omitted). Exhibit S-2 is a letter from Washington D.C. counsel regarding the risks of continued litigation. Nowhere in Exhibit S-2 is there any reference to, let alone credible support for, any dollar value of cost-of-service gas, certainly not $2,000,000,000. In fact, during the remand hearings, counsel for the Division, in explaining the benefits to the Commission, stated:

> With that underscored caveat, that we are speculating, even though on as informed a basis as possible, we can tell you and those interested here that the impact package we are talking about will be somewhere between four and five hundred million dollars, broken down as follows: the share of revenues from Wexpro, approximately $200 million, maybe plus; the share from wildcat properties which are subsequently explored and we hope--all parties hope, brought into production, perhaps another $150 million, and that is a conservative figure we feel. . . .

R. 00954-55. Four to five hundred million dollars may well be puffing. It is hardly permissible puffing or argument to inflate that figure, without any evidentiary support, to two billion dollars.

D. Contrary to the arguments of the Stipulating Parties, the ratepayers under the Stipulation and Agreement will subsidize the risk of Wexpro's oil and gas exploration program.

The Division and the Committee argue that:

> No expense will be allowed in any rate paid by MFS customers which is traceable to exploration or development expense.

Joint Brief at 37. Mountain Fuel argues to the same effect. Mountain Fuel Brief at 16. This contention is false. The answering briefs themselves not only admit, but emphasize, that Wexpro will receive "risk premiums" to compensate for the risk of drilling.

> If they find new gas, an incremental incentive allowance (8% on successful, commercial gas wells and 5% on successful oil wells) is provided for (Agreement §§II-8, III-5) to help compensate for these costs [of drilling dry holes] and the dry-hole risks.

Mountain Fuel Brief at 57 (emphasis added). See also Joint Brief at 16, n. 9, where the Division and the Committee explain:

> To the extent that development drilling is successful, a five percent (5%) premium will be allowed in addition to the base rate of return on investment in successful wells to compensate for the risk of developmental drilling. . . . (Emphasis added.)

The ratepayers are in fact defraying the costs of unsuccessful exploration--in other words, paying compensation for the risks of dry holes. 4/

---

4. The Stipulating Parties argue that the ratepayers will pay nothing traceable toward the risk of exploration and development when that is a convenient argument to show great ratepayer benefit. However, when it becomes necessary to rationalize the "risk premiums," those parties admit they are to defray risk. Neither the Division nor Mountain Fuel even attempts to reconcile this contradiction.

XI. THE STIPULATING PARTIES MISCHARACTERIZED AND MISQUOTED ARGUMENTS MADE BY THE DEPARTMENT IN ITS BRIEF.

The Division and the Committee in their Joint Brief list what are supposed to be six inaccuracies contained in the Department's original brief in this appeal. Each purported inaccuracy is quoted and underlined in the Joint Brief. None of the six is an accurate quotation. Not only are the Department's points misquoted, but they are either taken out of context, mischaracterized, or inaccurately argued to be erroneous. In fact, each of the Department's statements is absolutely correct.

Mountain Fuel and Wexpro also mischaracterize the Department's arguments and falsely try to refute them. For the sake of brevity, the Department herein sets forth only the most blatant falsehoods and false quotations.

A. Mountain Fuel in its Brief at page 58 cites as false the Department's statement that the producing oil reservoirs, originally transferred to Wexpro under the original Purchase and Sale Agreement, "will be and remain the sole and exclusive property" of Wexpro. The Department took this supposedly "false" contention right out of the Agreement, which states:

> Schedule 2(a) sets forth a complete list of productive oil reservoirs. . . .
>
> Any right, title and interest to the properties described on Schedules 2(a) and 2(b) and the corresponding leases, operating rights, wells and

> appurtenant facilities held by Wexpro will be and remain the sole and exclusive property of Wexpro . . .

Agreement ¶¶II-1 and II-2, R. 03595 (emphasis added).

B. The Division quotes the Department as saying:

> The Division gave up its right to represent the public interest before the Commission.

Joint Brief at 8. The Joint Brief misquotes the Department's Brief. The Department stated that:

> The Division, without legislative authority, gave up its power to challenge actions of Mountain Fuel, Wexpro or Celsius in violation of its duties to represent the public interest before the Commission.

Department Brief at 10. The Department is not arguing and never has argued that the Division gave up all its authority to represent the public interest before the Commission. However, the Division uncontrovertedly gives up, under the Stipulation and Agreement, its power to challenge the actions of Mountain Fuel, Wexpro or Celsius. Stipulation ¶¶5.2, 11.2, 12, 15.4, R. 03556, 03566-67, 03570.

C. The Division quotes the Department as stating:

> MFS's exploration program ended when the settlement was approved.

Joint Brief at 9. The Department actually stated:

> In contravention of the law, the Stipulation and Agreement lead immediately to the end of Mountain Fuel's utility exploration and development program.

Department Brief at 12. The quote is inaccurate, and the Department's statement is correct. What's more, Mountain

Fuel's unilateral cessation of its exploration program in 1980 makes the situation worse, not better, for the Stipulating Parties. Ceasing the program without approval of the Public Service Commission was contrary to the law of the State of Utah. In any event, the record could not be more clear that under the Stipulation and Agreement the utility will not be exploring and developing hydrocarbons.

XII. THE PETITION BY THE SHAREHOLDER ASSOCIATION IS A SHAM AND ARGUMENTS CONCERNING RES JUDICATA ARE NOT APPROPRIATELY BEFORE THIS COURT ON THIS APPEAL.

The positions of the Shareholder Association and Mountain Fuel regarding the res judicata effect of the Commission Order do not involve a real controversy and cannot be considered by this Court on this appeal. In fact, if there is a controversy, the Shareholder Association which is in part funded by Mountain Fuel, and Mountain Fuel which is as a matter of course aided by the Shareholder Association in legal disputes, are on the same side. That is obvious from a reading of the Shareholder Association's answering brief which makes the very same arguments as Mountain Fuel and Wexpro.

The Shareholder Association is asking this Court for an advisory opinion. There is simply no issue in this case which makes it appropriate for the Court to rule upon the res judicata effect of the Report and Order. The Shareholder Association cannot show that it has sustained or that

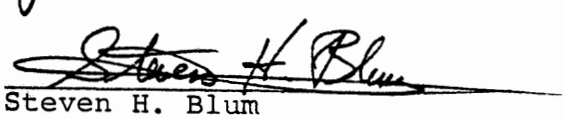
it is immediately in danger of sustaining any direct injury as a result of the supposed lack of finality herein. See Baird v. State of Utah, 574 P.2d 713, 717 (Utah 1978); see also Hoyle v. Monson, 606 P.2d 240 (Utah 1980); Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967).

All parties arguing in favor of res judicata, including the Stipulating Parties and the Shareholder Association, seek the same thing--a fiat by this Court that the Order is final and binding. The Shareholder Association argues that notwithstanding language to the contrary in the Report and Order, the Report and Order is not final enough to suit it. Mountain Fuel counters with an argument that the Order is final. Clearly they seek the same thing--something this Court cannot provide--a declaration that the order is res judicata and precludes a future Commission from redetermining the issues involved in this appeal. Such a determination must await an actual case or controversy, if ever that should arise, that puts that issue squarely before the Court.

Respectfully submitted this 23rd day of August, 1982.

GIAUQUE & WILLIAMS

By 
Jay D. Gurmankin

By 
Steven H. Blum

CERTIFICATE OF MAILING

On this 23rd day of August, 1982, two true copies of the foregoing Reply Brief of Utah Department of Administrative Services were sent by first-class mail with postage thereon fully prepaid to:

Calvin L. Rampton, Esq.
Jones, Waldo, Holbrook & McDonough
800 Walker Building
Salt Lake City, Utah 84111

Stephen H. Anderson, Esq.
Merlin O. Baker, Esq.
A. Robert Thorup, Esq.
Ray, Quinney & Nebeker
79 South Main, Suite 400
Salt Lake City, Utah 84111

Thomas A. Quinn, Esq.
Ray, Quinney & Nebeker
79 South Main, Suite 400
Salt Lake City, Utah 84111

Edward W. Clyde, Esq.
Clyde, Pratt, Gibbs & Cahoon
77 West 200 South
Salt Lake City, Utah 84101

Robert S. Campbell, Esq.
Gregory B. Monson, Esq.
Watkiss & Campbell
310 South Main, 12th Floor
Salt Lake City, Utah 84101

Bruce Plenk, Esq.
Ronald E. Nehring, Esq.
Utah Legal Services, Inc.
637 East Fourth South
Salt Lake City, Utah 84102

Donald B. Holbrook, Esq.
Elizabeth M. Haslam, Esq.
Jones, Waldo, Holbrook & McDonough
800 Walker Building
Salt Lake City, Utah 84111

Craig Rich, Esq.
Assistant Attorney General
Office of the Attorney General
State Capitol Building
Salt Lake City, Utah 84114

Brent H. Cameron, Chairman
David R. Irvine, Commissioner
James M. Byrne, Commissioner
Public Service Commission of Utah
State Office Building
Salt Lake City, Utah 84114

Ray Groussman, Esq.
Mountain Fuel Supply Company
180 East 100 South
Salt Lake City, Utah 84111

Jean H. Stott

RAY, QUINNEY & NEBEKER
PROFESSIONAL CORPORATION

S. J. QUINNEY
ALBERT R. BOWEN
W. J. O'CONNOR, JR.
ALONZO W. WATSON, JR.
STEPHEN B. NEBEKER
MITCHELL MELICH
L. RIDD LARSON
DON B. ALLEN
MERLIN O. BAKER
STEPHEN H. ANDERSON
CLARK P. GILES
JAMES W. FREED
THOMAS A. QUINN
H. HAL VISICK
EUGENE H. BRAMHALL
MARVEL E. HALL
JAMES L. WILDE
M. JOHN ASHTON
HERBERT C. LIVSEY
WILLIAM A. MARSHALL
PAUL S. FELT
GERALD T. SNOW
H. BRENT BEESLEY

ALAN A. ENKE
JONATHAN A. DIBBLE
SCOTT H. CLARK
JAMES W. GILSON
STEVEN H. GUNN
JAMES S. JARDINE
KENT H. MURDOCK
JANET HUGIE SMITH
JUDITH MITCHELL BILLINGS
DOUGLAS MATSUMORI
CARY D. JONES
ALLEN L. ORR
BRAD D. HARDY
BRIAN E. KATZ
A. ROBERT THORUP
ALAN B. FORD
TARA D. LUNDGRIN
LARRY G. MOORE
DALE C. HATCH

ATTORNEYS AT LAW
SUITE 400 DESERET BUILDING
79 SOUTH MAIN
SALT LAKE CITY, UTAH 84111
(801) 532-1500

92 NORTH UNIVERSITY AVENUE
PROVO, UTAH 84601
(801) 226-7210

PAUL H. RAY (1893-1967)
C. PRESTON ALLEN (1921-1971)
MARVIN J. BERTOCH (1915-1978)
A. H. NEBEKER (1895-1980)

October 15, 1981

The Honorable Public Service Commission
ATTENTION: Chairman Milly O. Bernard
330 East 400 South Street
Salt Lake City, Utah 84111

Re: In the Matter of the Petition of the Division of Public Utilities to Consider the Proposed Transfer of Certain Wells, Etc. of Mountain Fuel Supply Company to Wexpro Company on Remand from the Utah Supreme Court, Case No. 76-057-14

Honorable Commissioners:

The following is furnished in response to the request of Chairman Bernard for a brief summary of the benefits flowing to the ratepayers as a result of the proposed settlement of the Wexpro litigations, which settlement is presently being considered by the Commission:

1. An End of Litigation.

Assuming that the complex litigations involving the Wexpro issues continued for five years at the level of effort experienced during the past nine months (with the ratepayer essentially paying for counsel and experts on both sides), the total cost to the ratepayer would easily exceed $7,000.000 for attorney and witness fees. This $7,000,000 does not include the value of lost opportunity in the exploration and development program or the delay in receiving a return from the various properties.

2. 54% of the Net Profits from the Oil Properties.

We estimate that this benefit will be approximately $10 - 20,000,000 per year for the next 10 to 15 years. This estimate is very speculative since one cannot predict what will happen to costs of production, oil prices, volumes of production or field life.

3. Cost of Service Gas from the Oil Reservoirs.

During his testimony, Mr. Roseman estimated that cost of service gas produced by Mountain Fuel and its subsidiaries would be approximately $2.00 per Mcf during the near future and that the market price of such gas would be $5 - 6 per Mcf. Mountain Fuel Supply's 1980 Annual Report indicates a current production of gas from its Wexpro property to be approximately 2.5 million Mcf. That production should increase significantly as oil production gradually tails off and Wexpro begins to produce the gas reservoirs on those same properties. However, assuming the 2.5 million Mcf annually and a cost of service/market price differential of $3.00 per Mcf, the net benefit to the ratepayer would be $7,500,000 per annum. This calculation involves numerous assumptions concerning inflation in cost of production and market prices and thus is speculative.

4. Elimination of Exploration Allowances and Rates.

We are informed that there is currently approximately $3,000,000 in Mountain Fuel's retail gas rates reflecting an exploration allowance. It is estimated that in time this exploration allowance would have to increase several fold. By shareholders bearing the total exploration risk and expense, the per annum benefit to ratepayers is $3,000,000+ at the current rate and whatever increases the Commission might estimate as being reasonable with respect to future projections.

5. Carrying Cost of 101 and 105 Leases.

Approximately $4 - 5,000,000 per annum will be eliminated from rates.

6. 7% Overriding Royalty on Production from Exploration on Leases Currently Held in the 101 and 105 Accounts.

To value the overriding royalty, one must make assumptions concerning the revenue produced from hydrocarbons found on these properties. Such projections are of necessity speculative. Assuming, however, that exploration on these properties resulted eventually in gross revenues of $100,000,000 per annum (this was the estimate used by Mr. Roseman in his testimony and is Wexpro's current revenues) it would result in a benefit to the ratepayer of $7,000,000 per annum.

7. Right to Purchase Gas from the Exploration Properties.

The Agreement provides that the utility will have a first right of purchase on all gas produced from the 101/105 exploration properties and the 128,000+ acres of "after-acquired" Wexpro acreage. The Agreement provides that these purchases would be at [illegible]. The benefit to the ratepayer

from this provision would be an assured future supply of gas.

8. Cost of Service Gas from the Currently Producing Gas Reservoirs on the Account 101 Properties.

Mountain Fuel currently produces approximately 50,000,000 Mcf from its 101 properties at an average cost of service of 67¢ per Mcf. Mr. Roseman estimated that the development program might increase the production from these properties by another 50,000,000 Mcf per annum at a cost of service price of approximately $2.00 per Mcf. Assuming, as we did on the Wexpro gas, a differential between cost of service and market prices of $3.00 per Mcf, this right to cost of service gas could easily be worth $300,000,000 per annum. It should be noted that this was gas over which Mountain Fuel was attempting to obtain FERC jurisdiction and NGPA/deregulated prices.

9. 2½ Percent Overriding Royalty on Certain "Wildcat" Acreage Acquired by Wexpro Between January 1, 1977 and May 10, 1979 and Certain Additional Acreage Associated with the "Bug Field".

Once again we are speculating as to revenues from exploration of "wildcat" acreage. If we assume that this acreage produces revenues in the neighborhood of $10,000,000 per annum the 2½ percent royalty would produce a $250,000 annual benefit to the ratepayer.

10. 21 Million Dollar Reduction in Cost of Service.

The Agreement provides that over the first 12 months following approval of the Agreement there will be a $21,000,000 reduction in cost of service which we calculate gives approximately $50.00 to the average residential ratepayer.

11. Special Rate Reduction.

The last paragraph of the Agreement provides for a special rate reduction of $250,000.00 per year for 12 years.

12. There is one other benefit which has been negotiated but is very difficult to quantify. The Agreement provides that future allocation between gas and oil of depreciation and costs associated with the producing properties will be done on a "market" rather than a "BTU" basis. This will result in the first year in an allocation of 100 percent more costs and depreciation to the oil and away from the gas than in the immediately previous year.

I hope that this is responsive to the questions you had concerning the benefits accruing to the ratepayer as the result of the proposed settlement agreement and stipulation.

Very truly yours,

RAY, QUINNEY & NEBEKER

Thomas A. Quinn

TAQ/as